CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted]222

A. P. KENNEDY AND JOHN KENNEDY

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED FEBRUARY 17, 1923.

(29,409)

(29,409)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 859.

A. P. KENNEDY AND JOHN KENNEDY

vs.

THE UNITED STATES OF AMERICA.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate from U. S. circuit court of appeals for the eighth circuit	1	1
Statement of the case	1	1
Question certified	2	1
Judges' signatures	3	2
Clerk's certificate	4	2

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 5, 1923.

1 United States Circuit Court of Appeals, Eighth Circuit.

No. 5854.

A. P. KENNEDY and JOHN KENNEDY, Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, Defendant in Error.

The United States Circuit Court of Appeals for the Eighth Circuit, certifies that in the case above entitled which is pending in this court, the record on the writ of error to the trial court, the United States District Court for the Western District of Oklahoma, discloses these facts:

The plaintiffs in error, defendants below, were indicted, tried, convicted and each of them was sentenced to confinement in jail for six months and to pay a fine of $1,000 for having eighteen quarts of whiskey in his possession in the Indian Country, in the County of Osage, in the State of Oklahoma, on the 24th day of July, 1920, in violation of the Act of July 23, 1892, Section 4136*a*, Compiled Statutes, and its amendments, (United States vs. Wright, 229 U. S. 226, Joplin Mercantile Co. vs. United States, 236 U. S. 531), the Act of January 30, 1897, Section 4137, Compiled Statutes, and the Act of May 25, 1918, Section 4137*a* Compiled Statutes, which made
2 possession of intoxicating liquor in the Indian Country a criminal offense and prescribed a punishment of not exceeding two years' imprisonment and a fine of not exceeding $300 for the first offense.

Each of the defendants demurred to the count of the indictment which charged this offense on the ground that the parts of the Acts cited above which created the crime of and fixed the punishment for having possession of intoxicating liquor in the Indian Country were superseded and repealed before the 24th day of July 1920 by the enactment of the National Prohibition Act of October 28, 1919, 41 Statutes at Large 305, so that the count of the indictment challenged was insufficient in law and charged no offense. The District Court overruled the demurrer, that ruling is assigned in this court as error by the defendants below, and they cite in support of that assignment Title II, Sections 3, 25, 29, 33, and 35 of the National Prohibition Act.

It is further certified that the following question of law arises from the record in this case and is presented to this court for decision, that the decision of it is indispensable to a determination of this case, and that this court desires and requests the instruction of the Supreme Court upon it to the end that it may properly discharge its duty.

Was that portion of the Act of July 23, 1892, Section 4136*a*, Comp. Stat. as amended by the Act of January 30, 1897, Section 4137 Comp. Stat. and by the Act of May 25, 1918, Section 4137*a*, Comp. Stat., which made possession of intoxicating liquor in the

Indian Country a criminal offense and fixed the punishment
3 therefor repealed, superseded or modified by the enactment of the National Prohibition Act, 41 Statutes at Large, 305, 308, Title II, Sections 3, 25, 29, 33 and 35? Walter H. Sanborn, United States Circuit Judge; Wm. F. Kenyon, United States Circuit Judge; John C. Pollock, United States District Judge, who are the judges who sat in the Circuit Court of Appeals on the hearing of the case.

[File endorsement omitted.]

4 United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Certificate in the case of A. P. Kennedy, et al., Plaintiffs in Error, vs. United States of America, Defendant in Error, No. 5854, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said Certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of February, A. D. 1923. E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit. [Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

[Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1922. No. 5854. A. P. Kennedy, et al., Plaintiffs in Error, vs. United States of America. Certificate of Question to the Supreme Court of the United States.

Endorsed on cover: File No. 29,409. U. S. Circuit Court Appeals, 8th Circuit. Term No. 859. A. P. Kennedy and John Kennedy vs. The United States of America. (Certificate.) Filed February 17th, 1923. File No. 29,409.

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No. 222

In the

Supreme Court of the United States.

October Term, 1923.

A. P. KENNEDY AND JOHN KENNEDY,
Plaintiffs in Error,

VERSUS

THE UNITED STATES OF AMERICA,
Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF PLAINTIFFS IN ERROR

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 222.

A. P. KENNEDY AND JOHN KENNEDY,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

PAGE

SUBJECT INDEX.

Statement. 1

Certificate of United States Circuit Court of Appeals for the Eighth Circuit. 2

Statutory provisions of Acts of 1892, 1897 and 1918. 4

Statutory provisions of National Prohibition Act. 7

Points and Authorities (showing propositions and authorities supporting same). 12

(I) The question certified by the Circuit Court of Appeals for the Eighth Circuit to this court must be answered in the affirmative, inas-

PAGE

much as all prior legislation with reference to the possession of intoxicating liquors in the Indian Country, and especially any penalties for such offense, are unquestionably repealed by the National Prohibition Act. 12

(II) The Acts of 1892, 1897 and 1918 are general, and not special, and the rule of inconsistency or repugnancy, in creating a repeal by implication, where a later act follows another, covering the same subject-matter, applies in its fulness. 36

(III) If the contention of the government be sustained that the former Acts of Congress are not repealed by the National Prohibition Act, the co-existent acts would violate the Fifth Amendment to the Constitution of the United States, and the repeal of the former by the latter must necessarily be sustained. 45

Conclusion. 57

ALPHABETICAL LIST OF CONSTITUTIONAL AND STATUTORY PROVISIONS, CASES AND TEXT BOOKS CITED.

United States Constitution:

Eighteenth Amendment. 55

Acts of Congress:

Act of July 23, 1892. 4
Act of January 30, 1897. 4
Act of May 25, 1918. . . . . 6, 12
Section 3, Title II, National Prohibition Act. 7, 13
Section 25, Title II, National Prohibition Act. 7

PAGE

Section 29, Title II, National Prohibition Act. 9
Section 33, National Prohibition Act. 8
Section 35, National Prohibition Act. 8

Clairmont v. *United States*, 225 U. S. 556. 43
District of Columbia v. *United States*, 11 Wall. 88. 22
Ex parte Lange, 18 Wall. 163. 48
Forty-three Gallons of Cognac Brandy, 11 Fed. 47. 39
United States v. *Brooks*, 67 L. ed. 7 Advance Opinions. 31
United States v. *Twelve Bottles of Whiskey*, 201 Fed. Rep. 91. 43
United States v. *Remus*, 67 L. ed., 7 Advance Opinions 211. 29
United v. *Remus*, 283 Fed. Rep. 685. 27
United States v. *Stafoff*, 67 L. ed., 7 Advance Opinions 211. 28
United States v. *Stafoff*, 268 Fed. 417. 24
United States v. *Tynen*, 11 Wall. 88. 19
United States v. *Windham*, 264 Fed. Rep. 376. . . 46
United States v. *Yugonivich*, 256 U. S. 450. . .13, 17

26 Am. & Eng. Ency. Law (2nd ed.) 530. 38
16 Corpus Juris 233. 46
36 Cyc 985. 37
8 Ruling Case Law 134, Sec. 114. 45
25 Ruling Case Law 930, Sec. 179. 34
25 Ruling Case Law 763, Sec. 7. 38

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 222.

A. P. KENNEDY AND JOHN KENNEDY,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* PLAINTIFFS *in* ERROR.

Statement.

This case is here on certificate from the Circuit Court of Appeals for the Eighth Circuit. A single question of law is involved, and that is, whether or not that portion of the Act of July 23, 1892, as amended by the Act of January 30, 1897, and by the Act of May 25, 1918, which made the possession of intoxicating liquor in the Indian Country a criminal offense, and fixed the punishment therefor, was repealed, superseded or modified by the enactment of the National Prohibition Act.

No further statement is necessary than to place before the court the certificate by the Circuit Court of Appeals, and the various Acts of Congress involved, so far as pertinent to the underlying question of law to be determined.

Omitting caption, certificate of the clerk of the Circuit Court of Appeals, and endorsements, the certificate is as follows:

> The United States Circuit Court of Appeals for the Eighth Circuit, certifies that in the case above entitled which is pending in this court, the record on writ of error to the trial court, the United States District Court for the Western District of Oklahoma, discloses these facts:
>
> The plaintiffs in error, defendants below, were indicted, tried, convicted and each of them was sentenced to confinement in jail for six months and to pay a fine of $1,000 for having eighteen quarts of whiskey in his possession in the Indian Country, in the County of Osage, in the State of Oklahoma, on the 24th day of July, 1920, in violation of the Act of July 23, 1892, section 4136a, Compiled Statutes, and its amendments (*United States* v. *Wright*, 229 U. S. 226; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531), the Act of January 30, 1897, section 4137, Compiled Statutes, and the Act of May 25, 1918, section 4137a, Compiled Statutes, which made possession of intoxicating liquor in the Indian Country a criminal offense and prescribed a punishment of not exceeding two years' imprisonment and a fine of not exceeding $300 for the first offense.

Each of the defendants demurred to the count of the indictment which charged this offense on the ground that the parts of the acts cited above created the crime of and fixed the punishment for having possession of intoxicating liquor in the Indian Country were superseded and repealed before the 24th day of July, 1920, by the enactment of the National Prohibition Act of October 28, 1919, 41 Statutes at Large 305, so that the count of the indictment challenged was insufficient in law and charged no offense. The District Court overruled the demurrer; that ruling is assigned in this court as error by the defendants below, and they cite in support of that assignment Title II, sections 3, 25, 29, 33 and 35 of the National Prohibition Act.

It is further certified that the following question of law arises from the record in this case and is presented to this court for decision, and that the decision of it is indispensable to a determination of this case, and that this court desires and requests the instruction of the Supreme Court upon it to the end that it may properly discharge its duty:

Was that portion of the Act of July 23, 1892, section 4136a, Comp. Stat., as amended by the Act of January 30, 1897, section 4137, Comp. Stat., and by the Act of May 25, 1918, section 4137a, Comp. Stat., which made possession of intoxicating liquor in the Indian Country a criminal offense and fixed the punishment therefor repealed, superseded or modified by the enactment of the National Prohibition Act, 41 Statutes at Large, 305, 308, Title II, sections 3, 25, 29, 33 and 35?

Statutory Provisions of Acts of 1892, 1897 and 1918.

The Act of July 23, 1892, section 4136a, section 2139, Revised Statutes, 27 Statutes at Large 260, Compiled Statutes, 1916, is as follows:

> No ardent spirits, ale, beer, wine or intoxicating liquor or liquors of whatever kind shall be introduced under any pretense, into the Indian Country. Every person who sells, exchanges, gives, barters or disposes of any ardent spirits, ale, beer, wine or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer or intoxicating liquor of any kind into the Indian Country *shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense.* But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into the Indian Country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department.

The Act of January 30, 1897, 29 Statutes at Large 506, section 4137, Compiled Statutes, 1916, is as follows:

> That any person who shall sell, give away, dispose of, exchange, or barter any malt, spiritous or vinous liquor including beer, ale and wine, or any ardent or other spiritous liquor of any kind whatsoever, or any essence, extract,

bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom an allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian, a ward of the Government, under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spiritous, or vinous liquor, including beer, ale and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian Country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, *shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter;* provided, however, that the person convicted shall be committed until the fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine or intoxicating liquors into Indian Country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department.

The acts just quoted relate to the selling of intoxicating liquors to Indians, and the introduction thereof into the Indian Country. Thereafter, on May

25th, 1918, Congress passed an act enlarging the operation of the two former acts so as to make it an offense for any person to have intoxicating liquors in his possession in the Indian Country. This act, section 4137a, Compiled Statutes, 1916, is as follows:

> On and after September first, nineteen hundred and eighteen, *possession by a person of intoxicating liquors in the Indian Country*, where the introduction is or was prohibited by treaty of the Federal Statutes *shall be an offense and punished in accordance with the provisions* of the acts of July twenty-third, eighteen hundred and ninety-two (Twenty-seven Statutes at large, page two hundred and sixty), and January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at large, page five hundred and six).

That the act of 1897, set out above, is merely an amendment to the act of 1892, although not so entitled, is now well established by *United States* v. *Wright*, 229 U. S. 226, 57 L. ed. 160, and *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, the effect of which decisions is that, in the passage of the act of 1897, Congress did not intend to repeal the act of 1892, but kept it alive and carried with it the penalties it imposed. After passage, therefore, of the act of 1918, up to the time of the taking effect of the National Prohibition Law, it was unquestionably a violation of the Federal Statute to have *possession of intoxicating liquors in the Indian Country*,

and the penalty for the violation thereof, as prescribed by the act of 1892, was imprisonment of not more than two years and a fine not to exceed three hundred dollars.

Statutory Provisions of National Prohibition Act.

Section 3, Title II, of the National Prohibition Law, which is a law passed to vitalize the Eighteenth Amendment, 41 Statutes at Large 308, among other things, provides as follows:

> No person shall on and after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, deliver, furnish or *possess* any intoxicating liquor except as authorized in this act, and all provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The rest of the preceding section, excepting wine used for sacramental purposes, and so forth, is immaterial.

Section 25, Title II, 41 Statutes at Large 315, also provides:

> *It shall be unlawful to have or possess any liquor* or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property.

Section 33, Title II, of the act, prescribes, after February 1, 1920, the possession of liquor by any person shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away or otherwise disposed of in violation of the provisions of the act.

Section 35, Title II, of the act, 41 Statutes at Large 317, also provides as follows:

> All provisions of the law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve any one from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The penalties imposed by the National Prohibition Act for the offense of having, or being in pos-

session of, intoxicating liquor unlawfully, will be found in Section 29, Title II, 41 Statutes at Large 316, which is as follows:

> Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.
>
> Any one violating the provisions of any permit, or who makes any false record, report or affidavit required by this title, *or violates any of the provisions of this title, for which offense a special penalty is not prescribed,* shall be fined *for the first offense not more than $500;* for a second offense *not less than $100, nor more than $1,000 or imprisoned not more than ninety days;* for any subsequent offense he shall be fined *not less than $500, and be imprisoned not less than three months nor more than two years.* It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information or indictment. The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing non-intoxicating cider or fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.

Inasmuch as no penalty is specifically provided in other parts of the act for the offense of unlawful possession of intoxicating liquor, it necessarily follows that the punishment for such offense, under the National Prohibition Law, is *a fine of not more than $500 for the first offense*, and for the second offense, *a fine of not less than $100, nor more than $1,000, or imprisonment not more than ninety days.* This being the first offense, since neither the certificate nor the record below show any pleading in the indictment of a former conviction, if the defendants below had been tried under the National Prohibition Act, their punishment could not have been anything but a fine, not to exceed $500. It follows, therefore, that the penalty under the old law was far more severe than what could have been imposed under the National Prohibition Law.

From what has been shown as to the state of the law, there would ordinarily be no controversy as to the proposition that the National Prohibition Act repealed the former Federal Acts affecting the sale or possession of intoxicating liquor in the Indian Country, were it not for the peculiar language found, in what is termed the repealing clause, section 35, title II, of the Volstead Act. That section, however, when carefully analyzed, seems merely to undertake by express language, what would have been the effect, if no repealing clause had been inserted at all, and the question as to whether or not there had been a repeal had been left to be determined by

the rules underlying repeals by implication. The act seems to recognize that inconsistent provisions of the later act necesssarily repeal like provisions in the former act, and undertakes to save, what it really had no need to preserve, such of the former act as were not inconsistent with the later and final Act of Congress. The language of the section is that "all provisions of law that *are inconsistent* with this act are repealed *only to the extent of such inconsistency.*" The act, therefore, does not undertake to save from repeal any provisions of any other act that may be inconsistent with its own.

Upon the effect of this repealing clause, the District Courts and Circuit Courts of Appeals have been in wide variance. When we carefully examine and analyze the former and present legislation by Congress, however, and apply to them the decisions of this court, all the doubt disappears, and the conclusion is inevitable that former Acts of Congress, in the respects involved in this case, have been necessarily repealed, and the questions of law propounded to this court by the Circuit Court of Appeals must be answered in the affirmative.

POINTS *and* AUTHORITIES.

I.

The question certified by the Circuit Court of Appeals to this court must be answered in the affirmative, inasmuch as all prior legislation with reference to the possession of intoxicating liquors in the Indian Country, and especially any penalties for such offense, are unquestionably repealed by the National Prohibition Act.

The most cursory examination of the Acts of Congress, which we have set forth in the statement, will show that the prior acts relative to the possession of intoxicating liquors, as applied to the Indian Country, are exactly and fully covered by the National Prohibition Law. Indeed, the latter act covers everything comprehended in the former acts, necessarily resulting in a repeal.

The Act of May 25, 1918, provides:

> On and after September first, nineteen hundred and eighteen, *possession* by a person of intoxicating liquors in the Indian Country where the introduction is or was prohibited by treaty or Federal Statute shall be an offense and punished in accordance with the Acts of July twenty-third, eighteen hundred and ninety-two, * * * and January thirtieth, eighteen hundred and ninety-seven.

Section 3, Title II, of the National Prohibition Law, provides:

> No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or *possess* any intoxicating liquor except as authorized in this act.

Section 25, Title II, of the same act provides:

> It shall be unlawful *to have or possess* any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.

No instance can be found where a later act more completely covers an earlier one than that now presented. It necessarily follows, therefore, that the one repeals the other.

In the very recent case of *United States* v. *Yugoniviteh*, 256 U. S. 450, 65 L. ed. 1043, this court has spoken on the subject, and laid the question at rest.

In that case, the question was before this court as to whether or not the National Prohibition Act and section 35 thereof, *supra*, had the effect of repealing numerous sections of the Revenue Laws. In that case, the indictment charged violation by the defendants of sections 3257, 3259, 3281 and 3282, of the United States Revenue Statutes, and this court found it unnecessary to advance any extended reason to show that the later act had the effect of re-

pealing all of the sections involved except in the first named section. This section made it a criminal offense for any one to defraud or attempt to defraud the United States of a tax on spirits distilled by one carrying on the business of a distillery. The count of the indictment charging a violation of this last mentioned section was given extended notice by this court, for the reason that the court found that it was inconsistent with the later act to require a tax on distilled spirits, even though such spirits were distilled contrary to law, and that, therefore, it would not be incompatible to punish a person for attempting to defraud the government of the tax, regardless of whether the spirits were distilled in a lawful distillery, or in defiance of the law. However, the court found, and shows in its opinion, that while this is true, yet that the later law also carries penalties of its own, and that such penalties are not so harsh as those prescribed under the section of the old law then under consideration, and seems to have been influenced to this conclusion very largely because of the fact that the penalties imposed under the late law were not so harsh as those under the old law.

In this connection, we desire to call attention to the first count of the indictment this court had under consideration, which was for defrauding, or attempting to defraud the United States of a tax on distilled liquor. We can readily see where a decision that the statutes involved in the other counts were

repealed would not be so strong here, for the reason that it may be said that the whole system of regulating distilleries, and having them registered, and placing a sign on them stating that they were "registered distilleries," and giving bond and otherwise complying with the acts, were wholly inconsistent and repugnant after the passage of the law that made distilling illegal, and made it impossible to register them, or give bond, or make other compliance demanded by the old law. But, in the case of defrauding the government of a tax on distilled spirits, the question of a repeal of that section was not so apparent, and became less so, when the court *in limine* felt constrained to hold and cite authorities showing that Congress had the right to tax intoxicating liquors, whether made legally or not. So, that this may appear, we quote now from the opinion, showing the holding of this court, where it is said:

> That Congress may, under the broad authority of the taxing power, tax intoxicating liquors notwithstanding their production is prohibited, we have no question. The fact that the statute in this aspect had a moral end in view as well as the raising of revenue presents no valid constitutional objection to its enactment.

After having held as above, this court then follows with the enunciation of the principles of law, establishing our contentions, saying:

> The question remains concerning the applicability of section 3257, involving the right to punish for attempting to defraud the United

States of a tax. Did Congress intend to punish such violation of law *by imposing the old penalty* denounced in section 3257, or as provided *in the new and special provision enacted in the Volstead Act?*

It is the contention of the government that section 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes. "* * * nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing law."

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when *clearly inconsistent with the earlier enactments. United States* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153. In construing penal statutes, it is the rule *that later enactments repeal former ones practically covering the same acts, but fixing a lesser penalty.* The concluding phrase of section 35, by itself considered, is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the 18th Amendment, and in view of the provisions of the Volstead Act intended to make that amendment effective.

Having in mind these principles, and considering now the first count of the indictment, charging an attempt to defraud and actually defrauding the government of the revenue tax, we do not believe that the general language used at the close of section 35, evidences the inten-

tion of Congress *to inflict for such an offense the punishment provided in section 3257*, with the resulting forfeiture, fine and imprisonment, and at the same *to authorize the prosecution and punishment under section 35, enacting lesser and special penalties* for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of $500 on retailers and $1,000 on manufacturers. Moreover, the concluding words of the first paragraph of section 35, as to all offenses charged, must be read in the light of established prnicipies governing the provisions of the Volstead Act itself, making it unlawful to possess intoxicating liquor, for beverage purposes, or property designed for manufacturing such liquor, and providing for its destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, *it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provisions for punishment made in the Volstead Act.*

The case at bar, it seems to us, presents a situation which comes squarely within the principles laid down by this court in the case just cited, and that every word there said as to the construction of the statutes, and particularly section 35 of the National Prohibition Act, called the "repealing clause," is peculiarly applicable here.

When the Act of July 23, 1892, prohibiting the introduction and sale of intoxicating liquor in the

Indian Country, and when the amendments thereto were made, making it an offense for any person to have intoxicating liquor in his possession, were passed, it was no violation of the Federal law in any other parts of the country to transport whiskey, introduce it from one place to another, or to possess it; in fact, the whole policy of the government was otherwise. The making and selling of whiskey seems almost to have been encouraged, for the government received a very large part of its revenues from these sources, but the government felt that, in the Indian Country it not only had the right, but it was its duty, to pass the laws enumerated, and to fix penalties for the violation thereof; but after the passage of the Eighteenth Amendment to the Constitution, which was followed by the National Prohibition Act vitalizing that amendment, and which went into every conceivable situation regarding intoxicating liquor and absolutely made it illegal, and an offense against the United States to make, sell, transport or possess (with certain exceptions not material here) intoxicating liquor in any parts of the United States or its possessions, then it is certainly difficult for the average mind to see how it could be reasonably contended that Congress had in mind to keep in force those old statutes affecting only small portions of the United States, after so comprehensive a measure had been passed fully covering the entire subject-matter, and applying to all parts of the United States and all persons therein.

In the preceding case, this court cites the early and leading case of *United States* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153, which has perhaps been cited oftener, and in more jurisdictions, than other cases upon the underlying questions.

In that case, stating the relative provisions of the two acts involved, and announcing the principles decisive of the case at bar, the court said:

> In the present case the questions presented have ceased to be material, and, consequently, it has become unnecessary to determine them, for, since they arose in the Circuit Court, Congress has passed a statute amending the naturalization laws, and prescribing certain punishments for their violation, which has worked a repeal of the provisions of the 13th section of the Act of 1813, Statutes at Large, 809. That statute, which was approved on the 14th of July, 1870, declares not only that the commission of the several acts *mentioned in the 13th section of the law of 1813* shall constitute a felony, but also a great number of other acts of fraudulent character in connection with the naturalization of aliens *shall constitute a similar offense*, and has made the infliction of a larger punishment for each discretionary with the court. The Act of 1813, imposes as punishment, either the imprisonment or fine, at the discretion of the court. The Act of 1870 authorizes either of the these punishments, or both, in like discretion of the court. The Act of 1813 allows the imprisonment to run between three and five years, and the fine to extend between $500 and $1,000. The Act of 1870 fixes the imprisonment between

one and five years, and the fine between $300 and $1,000.

There is no express repeal of the 13th section of 1813 declared by the Act of 1870, and it is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two acts *are repugnant in any of their provisions*, the later act, without any repealing clause, *operates to the extent of the repugnancy as a repeal of the first;* and even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was a substitute for the first act, it will operate as a repeal of that act. *Davies* v. *Fairborn*, 2 How. 236; *Bartlett* v. *King*, 12 Mass. 537; *Com.* v. *Cooley*, 10 Pick. 37; *Norris* v. *Crocker*, 13 How. 429; Sedgw. Stat. Law, 126.

Now, between the provisions of the Act of 1813 and the Act of 1870 there is a *clear repugnancy*. The first act makes the punishment for the offenses designated, imprisonment or fine. It provides that the punishment shall be one or the other, and in so doing declares that it shall not be both. The second act allows both punishments in the discretion of the court; it thus permits what the first law prohibits.

Again: the Act of 1913 provides that the imprisonment, when imposed as a punishment, shall not be less than three years, and may be extended to five. The act of 1870 allows the imprisonment to be fixed at one year, and from that period upwards to five years. In this, also, it permits what the first act forbids.

> Again: the Act of 1913 declares that the fine, when imposed, shall not be less than $500. The Act of 1870 allows the fine to be as low as $300, thus authorizing what the first act declares shall not be done.
>
> When repugnant provisions like these exist between two acts, *the latter act is held, according to all authorities, to operate as a repeal of the first act*, for the latter act expresses the will of the government as to the manner in which *the offense shall be subsequently treated.*

The case at bar falls squarely within the preceding case, as well as the *Yuginovich* case. In the instant case, under the former acts of Congress, the maximum punishment is by imprisonment for not more than two years, and by a fine of not more than three hundred dollars for each offense, and with a minimum punishment for the first offense of imprisonment of not less than sixty days, and a fine of not less than two hundred dollars. Under the National Prohibition Act, the punishment for the same offense is a fine of not more than five hundred dollars for the first offense; for the second offense, a fine of not less than one hundred dollars, or by imprisonment for not more than ninety days, and, for any subsequent offense, a fine of not less than five hundred dollars, and imprisonment for not less than three months nor more than two years. We have, therefore, exactly the same situation as presented in the case just preceding, and there is no escape from the conclusion that the National Prohibition

Law repeals, supersedes or modifies, the former acts of Congress so far as the penalties that are to be prescribed.

In *District of Columbia* v. *Hutton*, 143 U. S. 18, 36 L. ed. 60, there is found another strong case by this court, which fully sustains our contention. It meets every contention that can be made against our position, controlling the case at bar in our favor in every respect.

The second syllabus reads as follows:

> Where two acts are *repugnant in any of their provisions*, the later act, without any repealing clause, *operates to the extent of the repugnancy* as a repeal of the first.

The court said:

> We are not unmindful of the rule that repeals by implication are not favored. But there is another rule of construction equally well settled which we think applies to this case. Stated in the language of this court in *United States* v. *Tynen*, 78 U. S. 11 Wall. 88, it is this: "When there are two acts on the same subject, the rule is to give effect to both if possible. But if the two acts are *repugnant in any of their provisions*, the latter act, without any repealing clause, *operates to the extent of the repugnancy as a repeal* of the first; and even where two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act. *Mur-*

dock v. *Memphis*, 20 Wall. 590, 617; *Tracy* v. *Tuffly*, 134 U. S. 206, 223; *Fisk* v. *Henarie*, 142 U. S. 459.

Meeting the contention that it was the intention of Congress to keep the former act alive, and not to repeal the same, but nevertheless giving repealing effect to the later act, this court said:

> It is contended, however, that by the act of January 31, 1883, (22 Stat. at L. 412, Sup. to Rec. Stat. (2nd. ed.) 397), Congress recognized said §354 as still subsisting law, and that consideration should compel a reversal of the judgment below. We are not impressed with this contention. The object of the act just referred to was to abolish the detective force established by §340 of the Revised Statutes relating to the District of Columbia, and to increase the police force in certain respects. * * *
>
> It is manifest, however, from an inspection of this section, that there was recognition in it by Congress that said §354 was still subsisting law. *But even if Congress had supposed that section was still the law*, when, as a matter of fact, it had been repealed, it would make no difference in this consideration. * * * The question is, *Was §354 repealed by the Act of 1878?* That is a judicial question *to be determined by the courts*, upon a proper construction of that section and subsequent legislation upon the same subject-matter, and *is not for the legislative branch of the government to determine.*

In *United States* v. *Stafoff*, 268 Fed. Rep. 417, after affirmed by this court, as we shall later show, all the underlying principles are clearly stated.

In that case, there was an indictment under former revenue statutes, existing long prior to the National Prohibition Act.

Stating the effect of the provision that existing statutory provisions are but declaratory of the general law concerning appeals by implication, the court said:

> Section 35, Title II, of the Volstead Act, provides that all existing statutory provisions which are not inconsistent with the provisions of the Volstead Act are not to be held as repealed thereby, but to be additions to such act. Conversely it follows that there is a repeal of all former existing laws *when such former laws are inconsistent.* The provisions are *only declaratory of the general law*, if the new law is inconsistent with the old law on the same subject.

Stating the rule to be applied, the court further said:

> Holding that sections 3258, 3279 and 3281, R. S. (Comp. Stat. §§5994, 6019, 6021), were repealed by the Volstead Act, Judge SMITH, in the case of *United States* v. *Windham*, (D. C.) 264 Fed. loc. cit. 377, said:
>
> "The general rule for the construction of statutes is that, when a later statute is enacted *inconsistent with* a preceding statute and covering the entire ground of the subject-matter, it supersedes and *impliedly repeals* the preceding statute. Especially is this the case when the later statute imposes penalties *of less severity* for the same offense; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when

imposed in the later statute, *is presumed to supersede the earlier and heavier.*"

There can, of course, be no manner of doubt as to the correctness of the applicatory rule as stated by Judge SMITH, in the above excerpt. *U. S.* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153. * * *

A test that is fair, and I think all embracing *vel non*, may be applied in the case at bar by considering whether the acts charged against defendant under sections 3258 and 3282 are provided for and made punishable by the Volstead Act. If he may under the Volstead Act be punished *(a)* for setting up a still, and *(b)* for having in his possession mash fit for the production of distilled spirits, then he may be punished under two laws for identically the same act. If such condition exists, it would in my opinion constitute an inconsistency meet for the application of the rule of repeal by implication, and one which falls precisely within the purview of the rule which I have quoted above.

Opposite to this question it will be noted that section 25 of Title II, of the Volstead Act says:

"It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title, or which has been so used, and no property rights shall exist in any such liquor or property."

It follows that, if there has been actual manufacture of liquor, the defendants can be punished for the act under the first clause of section 29 of the Volstead Act. If they have not actually made distilled spirits, but simply had

in their possession a still adapted and designed for the making of such spirits, absent a permit allowing them to make the same, or if they had in their possession any mash so adapted and designed, in either case the still (whether set up or not set up) constitutes property within the meaning of section 25, and upon conviction the defendants may for either defense be punished under the provisions of the second clause of section 29 of Title II of the Volstead Act.

It ought to be fairly obvious that no one should be liable for the same act *to punishment under two sections of the criminal statutes.* Neither ought it to be a greater crime, or a crime punishable by a more infamous or severe punishment, to intend to commit, or to make preparation for the commission, of an offense, than it is to commit the offense itself. In other words, if a man manufacture liquor, either wine, beer or whiskey, he is punishable for the first offense by a fine, or a jail sentence; but (if the contention of the government is correct) if he merely set up a still, or merely has mash in his possession, he may be sentenced to the penitentiary for the first offense for a term as great as two years, regardless of whether he had actually made liquor. In no jurisdiction has an assault with intent to kill been ever regarded as more heinous, nor has it ever been more severely punished, than has wilful murder itself. I cannot bring myself to think that Congress had in mind so anomalous a situation. Rather I am constrained to believe Congress had in mind the very situation which has arisen here; that is, that inevitably there would be a

largely increased number of violations of the law by the use of the necessary paraphernalia in the forbidden manufacture of liquor. And that Congress did not intend (based upon the record of the violation of this law, as compared with the total population) some one-tenth of 1 per cent of the inhabitants of the United States would be annually incarcerated in the penitentiary.

So far as I can see, the Volstead Act covers and punishes, not only the acts charged against the defendants here, but also every other act and situation which can possibly arise. Without more, I conclude that the demurrer to the counts which attempt to charge offenses under the provisions of sections 3258 and 3282, R. S., ought to be sustained.

In *United States* v. *Remus*, 283 Fed. Rep. 685, afterwards affirmed by this court, a repeal of similar statutes to the ones now under consideration, was sustained. The first syllabus, reflecting the holding of the court, reads as follows:

Rev. St. §3242 (Comp. St. §5965), making it an offense to carry on the business of rectifier, wholesale liquor dealer, or retail liquor dealer, without having paid the special tax therefor, was repealed by National Prohibition Act, Title II, §35, so far as it relates to manufacturers or dealers in liquor for beverage purposes in violation of that act.

Sustaining this repeal, the court said:

This provision was held by the Supreme Court in *United States* v. *Yuginovich*, 256 U. S.

> 450, * * * to repeal section 3457, R. S., * * * in the case of one who makes liquor for beverage purposes without paying the tax. * * * Section 3257 denounces the non-payment of the tax with intent to defraud by the distiller, and is in *pari materia* with section 3242. There is no doubt that the effect of section 35 of Title II, of the National Prohibition Act *is the same upon each.* The result is that, * * * one who deals in liquors for beverage purposes is liable to the various penalties *prescribed* by the National Prohibition Act, but *not to those of section 3242.*

In the cases of *United States* v. *Stafoff*, No. 26, *Brooks* v. *United States*, No. 197, *United States* v. *Remus*, No. 403, No. 7 Advance Opinions, 67 L. ed., February 1, 1923, these cases being consolidated, this court affirmed the cases of *United States* v. *Stafoff*, and *United States* v. *Remus*, *supra*, making the decisions of the courts below those of this court.

Speaking with reference to the first case named, this court said:

> In the first of these cases Stafoff was indicted with another for having had in their possession a still intended for the production of distilled spirits for beverage and commercial purposes, without having registered it with the Collector of Internal Revenue, as required by Rev. Stat. §3258; * * * and in the second count for having unlawfully manufactured on premises other than an authorized distillery a mash fit for the production of distilled spirits, to-wit, whiskey, contrary to Rev. Stat. §3282. * * * A demurrer to these counts was sustained

(268 Fed. 417), and the United States brings the case here under the Criminal Appeals Act of March 2, 1907. * * *

No. 26, judgment affirmed.

Speaking with reference to the case of *United States* v. *Remus, supra,* this court said:

> In the third case, Remus and his associates were charged in six counts with having carried on the business of a wholesale liquor dealer, that of a retail liquor dealer, and that of a rectifier, without having paid the special tax as required by law. Rev. Stat. §3242. * * * A demurrer to these counts was sustained. 283 Fed. 685. The United States took a writ of error under the Criminal Appeals Act.
>
> In *United States* v. *Yuginovich*, 256 U. S. 450. * * * It was decided that §§3281 and 3282 *were repealed by the later law,* at least as to the production of liquor for beverage purposes. Since that decision, and with reference to it, as appears from House Rep. No. 224, 67th Congress, 1st session, and the debates, 61 Cong., Record, Par. 3, pp. 3095, 3096, the act supplemental to the National Prohibition Act was passed. Act of November 23, 1921, Chap. 134, §5, 42 Stat. at L. 222, 223. By §5 of this statute all laws in regard to the manufacture of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and remain in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are in direct conflict with any of the provisions of the National

Prohibition Act or this act. (But if an act violates both of the former and the latter, a conviction under one is a bar to a prosecution under the other.) It does not purport to construe the National Prohibition Act as leaving in force what this court has declared *to have been repealed.* It could not in this way give a retrospective criminality to acts that were done before it was passed, and that were not criminal except for the statutes held to have been repealed. * * * Of course, a statute purporting to declare the intent of an earlier one might be of great weight in assisting a court when in doubt, although not entitled to control judicial action. But that is not this case. The decision in *United States* v. *Yuginovich, must stand for the law* before November 23, 1921. In that case, besides what we have mentioned, it was held also that the penalty imposed by Rev. Stat. 3267, * * * on a distiller for defrauding the United States of a tax on the spirits distilled by him, *was repealed.* So far as liquor for beverage purposes the *same reasoning must apply* to the penalty in §3242, for carrying on the business of rectifier or wholesale or retail liquor dealer without having paid the special tax imposed by law.

This court then proceeds to hold that all acts committed before the supplemental legislation noted, were governed by the *Yuginovich* case, and on the basis that the acts involved had been repealed, and that all acts prior thereto, involved in the indictment, could not be made criminal, since there had been a repeal by the National Prohibition Act.

Speaking in this connection, and referring to the *Stafoff* case, this court said:

> The decision in Stafoff's case dealt with conduct before the date of the supplemental act, *and was right*. The keeping of a still for beverage purposes, contrary to §3258, is within the principle of the *Yuginovich* case, and the addition of the words "and commercial" to the statement of the purposes does not seem to us enough to take it out. The reference to this section in Title III, §8, of the Prohibition Act, may have been inserted simply for greater caution. It is one of the several considerations tending to a different conclusion in *United States* v. *Yuginovich*, but, as they did not prevail, cannot prevail now.

This court, therefore, on all counts in the *Remus* case, involving acts which preceded the Supplemental Act of Congress, held that the provisions of the National Prohibition Act had repealed all former acts inconsistent with, or repugnant thereto.

Speaking of the case of *Brooks* v. *United States*, this court said:

> The case of *Brooks* comes here on a certificate from the Circuit Court of Appeals for the Ninth Circuit. Brooks was convicted under the above mentioned §§3258 and 3282, and also under Rev. Stat. §3281, * * * for having carried on the business of a distiller without having given bond, as required by law. The third and fourth counts under §3282 respectively charged the making of a mash as above, and the separating by distillation of alcholic

> spirits from a fermented mash. The questions certified are whether the three sections mentioned are *repealed by the National Prohibition Act* of October 28, 1919, Chap. 85, 41 Stat. at L. 305, * * * and whether, if they are repealed, the cause should be remanded, with directions to enter judgment and impose sentence under the last mentioned act.

With reference thereto, this court further said:

> There remains the questions certified in *Brooks* v. *United States*. They are somewhat broader than we indicated in our summary statement, as they include the Revenue Laws generally as well as the §§3258, 3281 and 3282. The general question manifestly is too broad to require an answer. From the summary given of the indictment, we infer that what we have said is sufficient with regard to the sections named. The fourth question—whether, in view of what we have decided, the case should be remanded for judgment and sentence under the National Prohibition Act—*must be answered, No.* The indictment plainly purported to be drawn under the old law, and it would be unjust to treat the conviction as covering an offense under a law of fundamentally different policy if facts could be spelled that ought or might fall within the latter, although alleged with no thought of it, or any suggestion to the accused that he must be prepared to defend against the different charge. * * *
>
> No. 197, questions 1, 2 and 3, as limited above, answered, Yes. Question 4, answered, No.

This case, therefore, one of the very latest utterances of this court, fully sustains our contentions,

and conclusively establishes the principles, which repeal the former Act of Congress. Wherever and whenever the question has been presented, this court has uniformly held that the Volstead Act has repealed every provision of the National Prohibition Act inconsistent with its provisions.

Unquestionably, if the National Prohibition Act had been silent as to any repeal, no question would ever have been raised as to whether or not the former Acts of Congress, covering the possession of intoxicating liquors in the Indian Country was repealed. The patent repugnancy would have settled the question that the former acts were repealed.

As we have stated, however, the repealing clause of the National Prohibition Act is nothing more than a statutory incorporation in the act of the ordinary and universal rules of interpretation of statutes, and involves no more than a statutory incorporation of the rule of inconsistency or repugnancy as applicable to the National Prohibition Act, which would have applied without the express language contained therein. Were it not, therefore, for the peculiar language used by the act, doubtless no question ever would have been raised as to its having repealed the former act now involved.

The pertinent part of section 35, Title II, reads as follows:

> All provisions of the law that are *inconsistent* with this act are repealed *only to the extent of such inconsistency.* * * * Nor shall this act

> relieve any person from any liability, civil or criminal, heretofore or hereinafter incurred under existing law.

Now, let us take a statement of the underlying principles from one of the standard textbooks, which reflects the holdings of the courts, and we shall at once see that there is no efficacy in the peculiar language used in the preceding section, preventing the repeal of the former Acts of Congress as contended by us.

In section 179, 25 Ruling Case Law, 930, it is said:

> The general rules relating to the repeal of statutes by implication are as applicable to penal statutes as they are to any other class. As is true of other statutes, a penal act, in order to repeal a prior one, must relate to the same subject and have the same object in view. There can be no implied repeal of a statute relating to one offense by a later statute relating to a different, though similar offense. But if a criminal act deals with the same subject as a prior act and *is inconsistent with and repugnant to* the prior act, the latter will be repealed *to the extent of the inconsistency.* Thus, where the latter statute defines an offense that is described in an earlier statute, *the earlier statute is repealed;* and the same result follows where the new statute *changes the penalty,* as where punishment by fine or imprisonment is changed to fine and imprisonment.

The same result, therefore, would really have been reached if the National Prohibition Act had

remained entirely silent as to any repeal, leaving it entirely to implication. There is, however, when the language of section 35 is carefully read and analyzed, a positive incorporation of the rule of repugnancy or inconsistency incorporated in the act itself, although it was not necessary to accomplish the repeal.

When we consider the cases, which we have cited in the preceding part of this brief, it does not seem possible to believe that Congress intended that these acts, with their different penalties, should remain in force at the same time, covering the same section of the country. Yet, that has been the contention of the government. It is utterly inconsistent to believe that a person living, as these defendants did, in the suburbs of the City of Tulsa, one of the largest cities in the State of Oklahoma, where the mere fact of having in their possession some whiskey, coupled with the fact that the Osage Nation, or reservation, extended to and bordered on that city, should render them liable to the penalties of the old law, which would have permitted a fine and two years imprisonment, when, in practically every other portion of the United States, a fine for the first offense could not have exceeded $500.00. It is more reasonable to believe that, after the passage of the Eighteenth Amendment, it had been made, not only possible, but mandatory, to enact a law affecting all National Territory, and all the people therein. Congress intended by the passage of the National Pro-

hibition Act to wipe out all other laws, which were entirely and specifically covered by the new act, and which provided penalties either greater or less than those provided in any former of old acts. When the Eighteenth Amendment was passed, and became a part of the Constitution of the United States, the Indian Country ceased to exist, as a part of the territory over which Congress could legislate. When that amendment became a part of the organic law of this country, Congress was then empowered to legislate with reference to every inch of territory, whether in the States, Territories or insular possession of the government, and there was certainly no indication of a different power to exercise in merely the Indian Country. We submit, therefore, that the acts relied on by the government in the present case, in order to sustain any conviction, must be held to have been repealed by the National Prohibition Act.

II.

The Acts of 1892, 1897 and 1918 are general, and not special, and the rule of inconsistency or repugnancy, in creating a repeal by implication, where a later act follows another, covering the same subject-matter, applies in its fullness.

It was contended in the courts below that the Acts of 1892, 1897 and 1918, are special or local acts, and that, therefore they are not repealed by such a

general act as the National Prohibition Act. This contention cannot be sustained.

Until the passage of the National Prohibition Law, Congress was limited in its power and scope in passing laws like those now involved. Congress could not prohibit the manufacture, sale or possession of intoxicating liquors in the various states, except so far as there existed in such state a government reservation, Indian Country, or some similar situation. However, such limitation did not make of an act passed by Congress, covering generally, as those acts did, such territory or places, concerning which Congress could legislate, a special act, although the vigor of the act was limited as to territory, places and classes of people. The acts involved were co-extensive with the power of Congress, and were not, and could not be, special. Counsel in the courts below recognized that this was the only possible contention that could be made, which would sustain the indictment, and if that proposition fails, then the question propounded by the Circuit Court of Appeals must be answered in the affirmative. An examination of the authorities, we submit, will show that it is without substance.

In 36 Cyc 985, the definition of a general statute is thus given:

> A general or public act is a universal rule affecting the entire community or class of the community covered by it. It is not necessary, however, in order to constitute a public act, that

it should be equally applicable to all parts of the state. It is sufficient if it extends to all persons doing or omitting to do an act *within the territorial limits* described in the statute.

In 26 Am. & Eng. Ency. Law (2nd ed.) 530, it is said:

> A public act, according to Blackstone, is a universal rule that regards the whole community. If by this it is meant that the act must apply to *the whole territory,* or the *entire people* subject to the legislative jurisdiction, the definition has undergone considerable modification in the United States, as it is now held that an act which in anywise affects the public at large, *although operating in the limits of a particular locality,* is as much a public act as one *operating throughout the entire state.*

In section 7, 25 Ruling Case Law 763, it is said:

> A public act, according to Blackstone (1 Bl. Com. 86), is a universal rule, that regards the whole community. In this country, it has been said, the disposition has been, on the whole, to enlarge the limits of the class of public statutes and to bring within it all enactments of a general character, which in any way affect the community at large. While public acts are usually general in their character and operation, and equally applicable in all parts of the state, a statute will not be deemed private merely because it extends *only to particular localities or classes of persons.*

These general definitions ought to settle the question, as they clearly establish that the Acts of

1892, 1897 and 1918, are general, and not special. We desire, however, to call attention to a few cases, which are decisive of the question, and fully establish our contention.

In the case of *Forty-three Gallons of Cognac Brandy,* 11 Fed. Rep. 47, there is found a case exactly in point. This case involved the question as to whether the first section of the Act of 1834, and the act itself, involving the introduction of spiritous liquors or wines into the Indian Country, was a general act, or special or local. Under the provisions of the Revised Statutes, if general, it was repealed, and, if special or local, it was not repealed. Unequivocally holding the statute general, and thus repealed, the court said:

> The point most discussed on the hearing is one which was not brought to the attention of the court below, but which may nevertheless be raised here, as it goes to the question whether there is any statute of the United States now in force which locates and defines the extent or boundaries of the Indian Country. The first section of the Act of Congress of June 30, 1834, (4 St. 729), defines the Indian Country as follows: "All that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi River and not within any State, to which the Indian title has not been extinguished." There is no other stautory definition or description of the Indian Country.

Our first inquiry will be, is the first section of the Act of June 30, 1834, still in force, or has it been repealed by the enactment of the Revised Statutes of the United States? The section is not found, either in form or substance, re-enacted in the Revision. It is entirely omitted therefrom. Other portions of that law are embodied in the Revision, as will be seen by reference to sections 2129, 2130, 2131, 2132, 2133, 2134 and 2155.

The Revised Statutes, §5596, provide that:

"All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in said Revision, are hereby repealed, and the section applicable thereto shall be in lieu thereof; all parts of such acts not contained in said Revision having been repealed or suspended by subsequent acts, or not being *general* or permanent *in their nature*. Provided, that the incorporation into said Revision of any general or permanent provision, taken from an act containing other provisions of a private, *local*, or temporary character, shall not repeal or in any way affect any provision of a private, *local*, or temporary character contained in any of said acts, but the same shall remain in force," etc.

It is plain that the first section of the act of 1834 is repealed by this legislation, unless it comes within the proviso just quoted, as being private, *local*, or temporary. The Act of 1834, known as the trade and intercourse act, considered as a whole, was, in my judgment, a public act, permanent in its character, and of great general importance. It was neither *local*, private, nor temporary, within the ordinary sig-

nification of those terms, as used in the acts of Congress. It established an elaborate and comprehensive code, regulating trade and intercourse with the Indian Tribes, and provided for the punishment criminally of all persons violating any of its provisions. Looking at the entire act, no lawyer would think of classing it among the statutes usually denominated *local,* private or temporary. But it is said that while the general provisions of the act are of a public and general character, the first section is both local and temporary.

It is insisted that the said section is local, because those parts of the acts dependent upon it for their applicability are by said section *limited to a portion* of the United States, and *not to the whole.* This point is not well taken. The statute concerned all the people of the United States. It binds all within the jurisdiction of the law-making power, *although its operation may be limited to the territory described.* The proper definition of a private or *special* statute is one which relates to certain individuals or particular classes of men. Statutes which relate to matters of public policy, as contradistinguished from those which relate to private interests and particular individuals only, are public acts; and hence it has been held that statutes for the establishment of towns and counties, the erection of court-houses, bridges, and ferries, and the like, are public acts. So, also, are acts, which, *though affecting a particular locality, apply to all persons.* Upon this general subject, see, Sedgwick, St. & Const. 30 to 33, inclusive; *Clark* v. *City of Janesville,* 10 Wis. 186; *Iowa County Seat Case,* 9 Wis. 279.

> It follows that whether we consider section 1, of the act of 1834, by itself (as I think we must) as a part of the entire act, and, therefore, as constituting, it must in either case be held that it is a *general* and not a *local* statute.
> * * *
> I am constrained, therefore, to hold that section 1 of the act of 1834 was repealed by the Revised Statutes of the United States, and that consequently the description of the Indian Country found in that section is no longer a part of the law of the land.

The Act of July 23, 1892, was in its essential features enacted by the Act of July, 1832, 4 Statutes at Large 564, and was revised by the Acts of March 15, 1864, 13 Statutes at Large 29, and of February 27, 1877, 19 Statutes at Large 244. In its essential features, it has stood on the Statute books of the United States, therefore, since 1832, and was there, when the Act of 1834 was passed. In the preceding case, it was practically conceded that the other provisions of the Act of 1834 were of a general, and not special, nature, but it was sought to have the definitive section of the act declared a special or local law. This legislation, therefore, relative to Indian Country, having started, when the proportion of the country that was inherently Indian was very large, would surely not then have been looked upon and declared a special or local statute. It cannot, however, become any the less general, because the limits of the Indian Country have contracted, and the places have grown fewer since that time.

In *United States* v. *Twelve Bottles of Whiskey*, 201 Fed. Rep. 91, the Circuit Court of Appeals for the Fifth Circuit, recognizes the general character of these acts, where it said:

> The treaties with the Crow Indians, and that statute affecting them, contain no prohibition of introduction of intoxicants upon any of said Indians' lands, and promise none after the Indian title thereto is extinguished. * * * The Crow lands are subject only *to the general statute* prohibiting introduction of intoxicants into the "Indian Country;" the term including allotments so long as the legal title is in the United States. Act of July 23, 1892, c. 234, 27 Stat. 260; Act Jan. 30, 1897, c. 109, 29 Stat. 506.
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> It is settled law that, when the Indian title to land is extinguished, such lands are no longer "Indian Country," that thereafter *the general statute* prohibiting introduction of intoxicants into the "Indian Country" no longer *propio vigore* applies to such lands, and that if the treaties or statutes by virtue of which the Indian title to such lands is extinguished do not prohibit the introduction of intoxicants thereon, or do not continue the application of *the general statute* aforesaid, it is lawful to introduce intoxicants there.

In *Clairmont* v. *United States*, 225 U. S. 556, 56 L. ed. 1201, this court applied the doctrine in the first case cited, 11 Fed. Rep. 47, where it treated section 1 of the Act of 1834, as repealed, and necessarily held that it was a general statute.

After having quoted the excerpt set forth in the Federal Reporter, giving the text of section 1, of the Act of 1834, this court said:

> This portion of the Act of 1834 was not re-enacted in the Revised Statutes, though other parts of the statute were, *and hence repealed by §5596* of the revision.

Under the decisions preceding, and under the general principles of law applicable, there can be no question but that the Acts of 1892, 1897 and 1918 are general statutes, and are in no sense special or local. Being in any respect inconsistent with, or repugnant to, the provisions of the National Prohibition Act, they are necessarily repealed to the extent of such inconsistency or repugnancy. As to such inconsistency or repugnancy, there has never been any question, and the sole contention in the courts below has been that those former Acts of Congress were special or local, which alone has been recognized could take from the general rule, resulting in a repeal by implication. Being general, as we have abundantly shown, and being so diametrically antagonistic and inconsistent, there can be no escape from the conclusion that they have been repealed by the National Prohibition Act.

III.

If the contention of the government be sustained that the former Acts of Congress are not repealed by the National Prohibition Act, the two co-existent acts would violate the Fifth Amendment to the Constitution of the United States, and the repeal of the former by the latter must necessarily be sustained.

The Fifth Amendment to the Constitution of the United States forbids any one being placed in jeopardy twice for the same offense. If the contention of the Government in the courts below be sustained, the former acts and the National Prohibition Act, all being general, it will result in persons who happen to be in what is called the "Indian Country" being subjected to the liability of being prosecuted and punished twice for the same offense, or being convicted twice upon what are substantially the same facts. This is the very purpose of the Fifth Amendment to prevent.

In section 114, 8 Ruling Case Law 134, the general doctrine is stated as follows:

> It is an established maxim of the common law, in the administration of criminal justice, constantly recognized by the elementary writers, and courts of judicature from a very early period down to the present time, that a man shall not be brought into danger for his life or limb for one and the same offense, more than once. This rule not only prohibits a second punishment for the same offense, but it goes further, and *forbids a second trial for the same of-*

fense, whether the accused has suffered punishment or not, and whether in the former trial he has been acquitted or convicted.

In 16 Corpus Juris 233, it is said:

> That no one shall be twice put in jeopardy for the same offense is an ancient and well established doctrine. It is a part of the universal law of reason, justice and conscience. It is embodied in the maxim of the civil law, *non bis in idem*, and is embedded in the very elements of the common law, and expressed in several of its maxims. This universal doctrine was incorporated into the Constitution of the United States, which provides that no person "shall be subject to the same offense or be put twice in jeopardy of life or limb," and the constitutions of nearly all the states contain a similar provision. * * * The protection afforded by the common law and by the constitutional provisions is effective, not only against *the peril of a second punishment*, but also against *a second trial* for the same offense.

In *United States* v. *Windham*, 264 Fed. Rep. 376, the conclusion for which we are contending was reached, and the doctrine applied. The third syllabus reads as follows:

> If the Act of October 28, 1919, Tit. 2, §35, repealing inconsistent provisions only to the extent of such inconsistency, and making the regulations for the manufacture of intoxicating liquors additional to existing laws, be construed *as intended not to repeal the provisions imposing heavier penalties* on the transportation and

concealment of intoxicating liquors on which the revenue has not been paid, it would be invalid as importing *an additional penalty* for the same act, *contrary to Const., Amend. 5, prohibiting double jeopardy.*

The court said:

The question, however, arises whether the statute of October 28, 1919, expressly continues of force and refuses to repeal those sections of the Revised Statutes. By section 35 of Title 2 of the statute of October 28, 1919, it is provided that all provisions of law inconsistent with that statute are repealed only to the extent of such inconsistency, and the regulations therein contained for the manufacture or traffic in intoxicating liquors are to be construed as an addition to existing laws, and further that the statute should not relieve any person from any liability, civil or criminal, theretofore or thereafter incurred under existing law.

In construing this section, it must be assumed *that Congress had in mind the existing rules of law, as well as the rules of statutory construction.* Under the provisions of the Fifth Amendment to the Constitution of the United States, prohibiting the placing of a party twice in jeopardy, and similar constitutional provisions, it has been held that the constitutional inhibition *to any attempt to try a man twice and to punish him twice for the same offense.* To such extent, therefore, as the last statute of October 28, 1919, *would appear to cover and include the same offense mentioned and described in the previous sections of the Revised Statutes of the United States, and to provide a punishment for them, it would be imposing different*

penalties and different punishments for the same offense, against the constitutional inhibition.

In the leading case of *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872, the breadth of the protection of the Fifth Amendment is well stated, and the underlying principles clearly outlined, when this court said:

> If there is anything settled in the jurisprudence of England and America, it is that ***no man can be twice lawfully punished for the same offense.*** And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.
>
> The principle finds expression in more than one form in the maxims of the common law. In civil cases the doctrine is expressed by the maxim that no man shall be twice vexed for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.
>
> In the criminal law the same principle, more directly applicable to the case before us, is expressed in the Latin, "***Nema bis punitur pro eodem delicto***" (2 Hawk. P. C., 377), or,

as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" 4 Co., 43; 11 Co., 95b. No one can be twice punished for the same crime or misdemeanor, is the translation of the maxim by Seargeant Hawkins.

Blackstone in his Commentaries cites the same maxim as the reason why, if a person has been found guilty of manslaughter on an indictment, and has had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed. 4 Black., 315 (Shars.).

Of course, if there had been no punishment the appeal would lie, and the party would be subject to the danger of another form of trial. But by reason of this universal principle, that no person shall be twice punished for the same offense, that ancient right of appeal was gone when the punishment had once been suffered. The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial.

The common law *not only prohibited a second punishment for the same offense,* but it went further and forbids a second trial for the same offense, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.

Hence to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense.

In the case of *Crenshaw* v. *Tenn.*, 1 Mart. & Yerg. 122, it was held by the Supreme Court

of that state: that an indictment, conviction and punishment in a case of felony not capital was a bar to a prosecution for all other felonies not capital committed before such conviction, judgment or execution.

If in a civil case (says DRAKE, J., in *State* v. *Cooper*, 1 Green (N. J.) 375), the law abhors a multiciplicity of suits, it is yet more watchful in criminal cases that the Crown *shall not oppress* the subject, or the Government the citizen, by unreasonable prosecutions.

These salutary principles of the common law have, to some extent, been embodied in the constitutions of several states and of the United States. By Article VII of the Amendments to the latter instrument it is declared that no fact once tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law; and by Article V, that no person shall for the same offense be twice put in jeopardy of life or limb * * * nor be deprived of life, liberty or property without due process of law.

It is not necessary in this case to insist that other cases besides those involving life or limb are positively covered by the language of this amendment; or that when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property without due course of law. On the other hand, it would seem equally difficult to maintain, after what we have said of *the inflexible rules of the common law against a person being twice punished for the same offense*, that such second pun-

ishment as is pronounced in this case is not a violation of that provision of the constitution.

It is very clearly *the spirit* of the instrument *to prevent a second punishment* under judicial proceedings *for the same crime,* so far as the common law gave that protection.

In the case of *Com.* v. *Olds,* 5 Litt. 137, one of the best common law judges that ever sat on the bench of the Court of Appeals of Kentucky remarked, "That every person acquainted with the history of governments must know that state trials have been employed as a formidable engine in the hands of the dominant administration. * * * To prevent this mischief of the ancient common law, as well as *Magna Charta* itself, provided that one acquittal or conviction should satisfy the law; or, in other words, that the accused should always have the right secured to him of availing himself of the pleas of *autrefois* and *autrefois convict.* To perpetuate this wise rule, so favorable and necessary to the liberty of the citizen in a government like ours, so frequently subject to changes in popular feeling and sentiment, was the design of introducing into our constitution the clause in question."

In the case of *Cooper* v. *State,* in the Supreme Court of New Jersey (1 Green, N. J., 361), the prisoner had been indicted, tried and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons who were in the house when it was burned. To this he pleaded the former conviction in bar, and the Supreme Court held it a good plea. It is to be observed that the punishment for arson could not technically extend either to life or limb;

but the Supreme Court founded its argument on the provisions of the constitution of New Jersey, which embodies the precise language of the Federal Constitution. After referring to the common law maxim, the court says: "The constitution of New Jersey declares this important principle in this form: 'Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' Our courts of justice would have recognized and acted upon it as one of the most valuable principles of the common law without any constitutional provision. But the framers of our constitution have thought it worthy of special notice. And all who are conversant with courts of justice must be satisfied that this great principle forms one of the strong bulwarks of liberty. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict.*"

And Hawkins, in his Pleas of the Crown (pp. 515, 526), says that both the pleas of *autrefois acquit* and *autrefois convict* are grounded on the maxim that a man * * * *shall not be brought into danger* of his life *for one and the same offense more than once.*

In *Moore* v. *People*, 14 How. 13, the defendant was fined $400 under the Criminal Code of that state for harboring and secreting a negro slave. The case came to this court under the 25th section of the Judiciary Act, on the ground that the right to legislate on that subject was exclusively in Congress. The court did not concur in that view of the question. But it also was urged that the party might be subjected twice to punishment for the same offense if liable to

be prosecuted under the statutes of both state and national legislatures. In regard to this Judge McLean said, in a dissenting opinion, that "the exercise of such a power by the states would, in effect, be a violation of the Constitution of the United States and of the respective states. They all provide against a second punishment for the same act." "It is contrary," said he, "to the nature and genius of our government *to permit an individual to be twice punished for the same act.*"

Mr. Bishop, in the latest edition of his work on criminal law (Secs. 990, 991, 5th ed.), speaking of this constitutional provision, says the construction of these words is that properly the rule extends to treason and all felonies, not to misdemeanors. Yet practically and wisely the courts have applied it to misdemeanors, and that in view of the liberal construction of statutes and constitutions in favor of persons charged with crime he cannot well see how courts can refuse to apply this constitutional guaranty in cases of misdemeanor.

Chitty (Cr. L., 452-462) also drops the words "life and limb" in speaking of the pleas of *autrefois acquit* and *autrefois convict*, and declares that they both depend on the principle that no man shall more than once be placed in peril of legal penalties upon the same accusation.

If we reflect that, at the time this maxim came into existence, almost every offense was with death or other punishment touching the person, and that these pleas are valid in felonies, minor crimes and misdemeanors alike, and on the difficulty of deciding when a statute under

modern systems does or does not describe a felony when it defines and punishes an offense, we shall see ample reason for the holding that the principle intended to be asserted by the constitutional provision must be applied to all cases where a second punishment is attempted to be inflicted by a judicial sentence.

For what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never again be tried for the same offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is *the punishment* that would legally follow the second conviction which is *the real danger* guarded against by the constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can again be sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and spirit in such a case as much violated as if a new trial had been had and, on second conviction, a second punishment inflicted?

The argument seems to us irresistible, and we do not doubt that the constitution was designed as much to prevent the criminal from being punished twice for the same offense as from being twice tried for it.

We shall not undertake to call the court's attention to the numerous other cases, which might be cited, showing how broadly the Fifth Amendment

is directed against any provision of, or situation in, law, which would place one charged with a criminal offense twice in jeopardy. The preceding case by this court shows how broad and far-reaching are the underlying principles, and the contentions of the Government, so far made in this case, are clearly against the spirit and intent of that amendment.

When we consider the language of the Eighteenth Amendment, this all the more pointedly appears. It reads as follows:

> After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors *within*, the *importation* thereof into, or the *exportation* thereof from, the United States and *all territory subject to the jurisdiction thereof*, for beverage purposes, is hereby prohibited.

This amendment, and all laws enacted by Congress vitalizing it, unless clearly limited in operation, necessarily extend over every inch of territory included in, and subject to the jurisdiction of, the United States. The United States had the jurisdiction and power to prohibit the possession of intoxicating liquors in what was known as "the Indian Country" prior to the adoption of the amendment, but, when its provisions were made a part of the constitution, then there became and was no difference between "the Indian Country" and any other portions of the United States or territory subject to the jurisdiction thereof, and, when the

National Prohibition Act was passed, Congress was acting without any limitation, and with precisely the same power, and with the same objects, with reference to "the Indian Country" as any other part of the territory subject to the Government's jurisdiction. The amendment obliterated "the Indian Country" so far as the power of Congress to legislate with reference to intoxicating liquors is concerned.

Most surely it never could have been the intention of Congress to have two laws for but a small part of the territory subject to the jurisdiction of the United States, and to have but one law for all the rest, thus subjecting some of its citizens to the jeopardy and danger of two prosecutions for identically the same act, and to two punishments therefor. The National Prohibition Act necessarily applies to, and is effective in all the states of the Union, and all territory subject to the jurisdiction of the United States, and if the Acts of 1892, 1897 and 1918 are not repealed, as contended by the Government, then both must be operative in "the Indian Country," thus clearly placing any citizen charged with the offense of possession in double jeopardy of both prosecution and punishment for the same identical act, when the Eighteenth Amendment itself, as to such act of possession, has entirely effaced the distinction between "the Indian Country" and all other territory affected by the amendment. Such a result is not only contrary to every rule of

statutory construction as to repeals, but is also in the very teeth of the Fifth Amendment, and cannot be allowed.

Conclusion.

From every angle we approach the question, we can reach, it seems to us, but one result, and that is, that the question propounded by the Circuit Court of Appeals must be answered in the affirmative. To hold otherwise, it seems to us, every rule of statutory and constitutional interpretation must be violated and an oppressive and discriminating result accomplished. Even a citizen in "the Indian Country," as formerly defined, would be placed at the mercy of the whim of the prosecuting officer as to whether or not he would be incarcerated in the penitentiary and punished by fine, or be given the milder punishment of a fine. Two citizens in such territory, having committed the same identical act, having had in possession the same kind and quantity of intoxicating liquor, and at the same time, and arrested and arraigned at the same time before the same magistrate, might be prosecuted by the same district attorney, one under one statute and the other under another statute carrying different penalties. The partiality of the prosecuting officer for one, and his prejudice against the other, or other instances, might lead to such a result. It is contrary

to the very genius and spirit of our Government, and we confidently believe will never be permitted.

Respectfully submitted,

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